IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	**No. CR03-0094**
vs.	**REPORT AND RECOMMENDATION**
HANS BRATZEL,	
Defendant.	

This matter comes before the court pursuant to the defendant's October 8, 2003, motion to suppress evidence (docket number 7). This matter was referred to the undersigned United States Magistrate Judge for the issuance of a report and recommendation. The court held an evidentiary hearing on this motion on November 20, 2003, at which the defendant was present and represented by Chad Frese. The government was represented by Assistant United States Attorney Teresa Baumann. It is recommended that the motion to suppress be denied.

In the motion to suppress, the defendant contends that the warrantless search and seizure of a backpack owned by him and found on his sister's patio violated the Fourth Amendment to the United States Constitution. He also contends that the warrantless search of his apartment that preceded the execution of a search warrant at that apartment violated the Fourth Amendment. The government contends that the defendant does not have a legitimate expectation of privacy at his sister's residence and that he abandoned the backpack. It contends that the police did a valid protective sweep search of his apartment. The court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On September 9, 2003, Cedar Rapids Police Officer Chip Joecken received a call from the Phoenix, Arizona Police Department. A package being shipped from Arizona to Cedar Rapids at the Airborne Express facility smelled like marijuana. The box was addressed to the defendant in Cedar Rapids. The package was shipped to Cedar Rapids and arrived on the morning of September 10, 2003. Officer Joecken and Officer Ryan Abodeely picked up the package and an Airborne delivery uniform.[1] The package was first taken to the police department where it was subjected to a dog sniff. After the dog alerted on the package, the police received a search warrant for the package from District Associate Judge Nancy Baumgartner. The package was opened and the police found marijuana inside of a television set.

The police then made plans to deliver the package to the defendant at his apartment at 1623 Park Towne Court NE, Unit N8. There were seven police officers doing surveillance of the attempted controlled delivery. Officer Gene Schiafos attempted to deliver the package while wearing an Airborne Express uniform. No one answered the door to the defendant's apartment. As Officer Joecken was walking in the area, an individual came up to him and asked him if he was looking for someone. Officer Joecken stated that he was not. The individual said that he did not live there but was in the area to visit his sister. Joecken knew that this individual fit the description of the defendant that the police had from driver's license information. Because the delivery was unsuccessful, one of the police officers attempting to make the delivery left a note on the door of the defendant's apartment indicating that he had attempted to deliver the package. He also left his cellular telephone number on the note.

Officer Joecken told Officer Abodeely that he believed that the individual he encountered was Hans Bratzel. Officer Abodeely attempted to follow the defendant back

[1]The police wanted to wear an Airborne Express delivery uniform when delivering the package for obvious reasons.

to his apartment. On the way, Abodeely lost sight of the defendant. Abodeely later saw the defendant leave his apartment carrying a red backpack. Abodeely again attempted to follow the defendant as he went through a garage complex toward some nearby townhouses. Again, Abodeely lost track of the defendant for approximately fifteen seconds. He encountered the defendant again as the defendant was returning from the nearby townhouses. He was not carrying the backpack at that time. The defendant went back into his apartment, called the cellular telephone number and arranged to have the Airborne package delivered to him.

As Officer Schiafos walked up to the front porch area of the defendant's apartment building, the defendant opened the front door for him (Shown on Government's Exhibit 1). As he went up the stairs, the defendant then opened a fire door for Officer Schiafos. The defendant still had not identified himself to Officer Schiafos. As Schiafos knocked on the defendant's apartment door, the defendant walked around Schiafos, opened the door, and identified himself as Hans Bratzel. The defendant then signed for the package. The defendant took the package and walked into his apartment with it. As he did, Schiafos displayed his police badge and placed the defendant under arrest inside the threshold of the apartment. Other officers were at the defendant's apartment within seconds. The defendant was told to sit down on a chair inside the apartment. Officer Joecken did a sweep search of the small apartment looking for any other individuals who might be there. It was his intention to secure a search warrant for the apartment and he wanted to be sure that no one was there who could jeopardize the safety of the arrest or destroy evidence.

Because Officer Abodeely believed that the defendant had left his red backpack somewhere in the area, Officers Schiafos and Abodeely went looking for the backpack. They began looking in the area of the townhouses where Abodeely had first observed the defendant without the backpack. The nearby townhouses consist of two buildings with eight adjoining townhouses in each. See Government's Exhibits 2 and 3. Each townhouse has a patio in front if it, approximately 10 ft. by 15 ft. in size. The patio is surrounded

by a six-foot high concrete wall. The wall has a wood door with no windows. See Government's Exhibit 4. Access to the residence is gained by going through the patio to approach the front door (Government's Exhibit 5). The wood door does not have a lock. It is the entrance that the public or delivery people would likely use to make contact with persons inside.

As Officers Abodeely and Schiafos walked down the row of townhouses, they looked into the patios by peering over the six-foot high concrete wall. When they reached apartment number 7, Schiafos spotted a red backpack. Schiafos and Abodeely went to the door and knocked on it. A woman answered the door. She was asked whether it was her backpack or whether she knew who owned it. She told the police that it was not hers and she did not recognize it. The police did not ask for consent to search it and she did not give consent. The police took the bag, opened it, and found a pound of marijuana, a handgun, cash, and identification belonging to the defendant.

The woman who answered the door at townhouse number 7 is the defendant's sister. The police did not know that she was related to the defendant. When the defendant moved from Phoenix to Cedar Rapids approximately two months prior to September 10, he lived for the first month with his sister in that townhouse. Following that, he moved to his own apartment. On September 10, 2003, he still possessed a key to his sister's residence, still had some of his belongings there, and still occasionally used the townhouse with his sister's permission.

CONCLUSIONS OF LAW

Reasonable Expectation of Privacy & Abandonment

Because the defendant was no longer living at his sister's residence and was not an overnight guest there, he had no reasonable expectation of privacy in the residence or its porch area. A person does not have a reasonable expectation of privacy in the home or

curtilage of another, and cannot make a Fourth Amendment challenge to an intrusion of that home. See United States v. Sturgis, 238 F.3d 956, 958 (8th Cir. 2001).

The defendant contends that when he left his backpack in the porch area of his sister's residence, he nevertheless retained a reasonable expectation of privacy as to its contents. The defendant further asserts that because the officers had control over the backpack, they should have obtained a warrant to search it.

The government responds that the defendant had no Fourth Amendment interest in his backpack after he abandoned it on the front patio area of his sister's residence. The government further contends that even though the defendant neither admitted nor denied ownership of the backpack at the time of his arrest, his "physical relinquishment" of the property was sufficient indicia of an intent to abandon it. The government also argues that the defendant had no objectively reasonable expectation of privacy in the backpack once he left it unguarded in a location at which members of the public could have access.

To prevail on his motion to suppress the evidence found inside the backpack, the defendant has the burden to demonstrate (1) that he had a subjective expectation of privacy; and (2) that his subjective privacy expectation was objectively reasonable. United States v. Hayes, 120 F.3d 739, 743 (8th Cir. 1997) (citing California v. Ciraolo, 476 U.S. 207, 211 (1986)).

It is well established that the warrantless search of abandoned property does not constitute an unreasonable search and does not violate the Fourth Amendment. See Abel v. United States, 362 U.S. 217, 241 (1960). "This is because '[w]hen individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had.'" United States v. Segars, 31 F.3d 655, 658 (8th Cir. 1994) (quoting United States v. Jones, 707 F.2d 1169, 1172 (10th Cir. 1983)). Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent. "Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant

circumstances at the time of the alleged abandonment should be considered." United States v. Hoey, 983 F.2d 890, 892 (8th Cir. 1993) (citations omitted). United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991). "The issue is not abandonment in the strict property right sense, but rather, whether the defendant in leaving the property had relinquished his reasonable expectation of privacy so that the search and seizure is valid." Id. (citations omitted). "Whether an abandonment has occurred is determined on the basis of objective facts available to the investigating officers, not on the basis of the owner's subjective intent." United States v. Tugwell, 125 F.3d 600, 602 (8th Cir. 1997). When considering whether the circumstances support a finding of abandonment, "two important factors are denial of ownership and physical relinquishment of the property." United States v. Landry, 154 F.3d 897, 899 (citing United States v. Nordling, 804 F.2d 1466, 1469 (9th Cir.1986)).

In United States v. Morgan, the defendant attempted to flee from the police following a traffic stop. He ran onto the porch of his friend who was driving the vehicle that was stopped. He threw a gym bag onto the porch of his friend's residence and then came back toward the police, ignoring their directions to stop. The defendant did not make any attempt to retrieve the bag following his arrest nor did he request that anyone else retrieve it for him. He made no attempt to protect the bag or its contents from inspection and the defendant made no other manifestation, verbal or otherwise, to indicate that he retained a reasonable expectation of privacy in the bag.

> The fact that Mr. Morgan was in the backyard of someone he knew or was acquainted with, at the time he threw the bag, is of little significance. The record reveals we do not have before us a case where the item was left to the care of responsibility of another, or where there is a delayed indication of an intent to retain an expectation of privacy in the item.

United States v. Morgan, 936 F.2d at 1570-71. Although the defendant may have hoped that the police would not find it and that he could later retrieve it, his ability to recover the

bag depended entirely upon fate and the absence of inquisitive (and acquisitive) passers-by. Id. at 1571.

Similarly, in United States v. Dillard, 78 Fed. App. 505 (6th Cir. 2003), police were approaching a residence to execute a search warrant when they encountered the defendant Dillard and another exiting the residence from a side door. The defendant was carrying a briefcase. As the police announced "Police, search warrant," "Police, put your hands up," or words to that effect, the defendant tossed the briefcase to the ground four feet away. The defendant then compounded his problems by pulling out a gun.

In Dillard, the Sixth Circuit Court of Appeals held that one of the most crucial facts of an abandonment case is the location of the object in question. It cited a Massachusetts Supreme Court case in which a defendant was found not to have abandoned a briefcase by throwing it into the fenced backyard of his own residence. It contrasted the situation with cases involving individuals who discard items in public places and found that the Dillard case fell somewhere in between those two examples. In Dillard, the location was not as open as a public street or parking lot, but neither was it entirely private. The Sixth Circuit Court of Appeals cited Morgan and quoted the indented passage above finding that the defendant had abandoned the briefcase. The Court noted that Dillard, like Morgan, was not attempting to secrete the container in a place where he had an expectation of privacy, but rather discarded the item in his attempt to avoid arrest.

The cases deciding abandonment issues therefore focus on the following factors. First, the court should examine verbal and nonverbal indications from the defendant as to his intention to abandon or retain an expectation of privacy in the property. Obviously, a defendant who throws an object when pursued by the police gives the appearance of throwing away the object. Second, statements by the defendant denying ownership of or knowledge of the object are strong indications of an intent to abandon the property. However, claims of ownership, directions as to its disposal or attempts to retrieve the object are indicative of an intent to retain the property. Third, the court must examine the

place from which the object is retrieved by the police. Objects taken from distinctively public places (i.e., roads or parking lots) will more likely be found to have been abandoned than items retrieved from the defendant's residence or other place that one might consider a place of "safe keeping." Fourth, the temporal proximity between the defendant's separation from the object and confrontation by the police is important. That is, the indication of abandonment is stronger where an object is thrown following inquiry or confrontation by the police. Finally, the facts must be reviewed as they appeared to the police and not the defendant's subjective belief about them.

This court considers the issue of abandonment to be a close issue. There is no evidence to indicate that the defendant knew that he was being pursued by the police at the time that he placed his backpack on his sister's enclosed porch. He was obviously conducting counter-surveillance that day. This is apparent from his questioning of a police officer about his presence in the area and from the manner in which he assisted the police officer posing as an Airborne Express delivery person as he entered the defendant's apartment building. It appears to the court that his action in leaving his apartment on the last occasion had no other purpose than to take his backpack to his sister's house. The point is that this is not a case where the defendant threw an object when confronted by persons he knew to be the police.

Second, the place at which the defendant left his backpack has some aspects to it that favor a finding of abandonment and others that do not. The defendant's sister's porch was a somewhat public space but only because the public was permitted to and would be expected to enter this area in order to get access to the residence. However, the nature of this area, with its six-foot high, enclosed concrete wall retained an obviously private character to it. It is an area where people in Iowa would feel comfortable keeping patio furniture, children's bicycles, and items for outdoor cooking. While delivery people or visitors may enter this area to access the residence, it would be extremely unlikely for anyone to be casually found there. It can only be called public because it is the entrance

to a home, not because the public would be there for any other reason than to approach the front door.

The defendant's sister did not know that he had placed his backpack on her porch. She did not know that it was his and he had made no effort to tell her that it was there or that he would return to retrieve it. In the situations where the defendant discarded items in such places while being pursued by the police, courts have found it to be of little significance that the defendant knew or was a friend of the owner of the residence.

However, when the facts are viewed objectively as they were presented to the police officers, the balance tips in favor of a finding of abandonment. As the police were monitoring the defendant's activities that day, it was obvious that the defendant was doing counter-surveillance. To the police, there appeared to be no other reason for the defendant to leave his residence with a backpack and return shortly thereafter without it, except to get rid of the backpack. The police lost sight of the defendant for approximately 15 seconds when he put the backpack on his sister's patio. After they found the backpack, they did not immediately seize it. Rather, believing that the defendant had just stashed the backpack on the patio, they asked the resident of the townhouse whether she recognized it or knew anything about it. She did not. When they took the backpack, the resident voiced no concern about it. Based on these facts, the police could reasonably believe that the defendant had picked that townhouse at random. The police had no reason to believe that the defendant had a connection with that particular townhouse. For these reasons, the court finds that the backpack was reasonably believed by the police to have been abandoned and the motion to suppress should be denied.

Warrantless Entry and Search of Defendant's Residence

The defendant contends that the officers conducted a full search of his residence, without a warrant and absent exigent circumstances, in violation of his Fourth Amendment rights. The government argues that the officers conducted a protective sweep of the defendant's residence based on a reasonable belief that the area to be swept may harbor an individual posing a danger to the officers. See Maryland v. Buie, 494 U.S. 325, 337 (1990)). Specifically, the government asserts that because of the controlled delivery of more than three kilograms of marijuana and the defendant's placing the marijuana inside his residence, the investigators could reasonably have believed that persons and items in the defendant's residence may pose a threat to officer safety. Based on these factors, the officers reasonably conducted a protective sweep of the defendant's residence to ensure their safety and to protect against destruction of evidence.

Upon the foregoing,

IT IS RECOMMENDED that, unless any party files objections[2] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b) by January 5, 2004, the defendant's motion to suppress be denied.

December 29, 2003.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

[2]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. See Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).